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100TH CONGRESS
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SENATE

REPORT
100-302

CLARIFYING THE STATUS OF SUBMERGED LANDS IN THE STATE OF ALASKA AND FOR OTHER PURPOSES

MARCH 18, 1988.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 2629]

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 2629) to amend the Alaska National Interest Lands Conservation Act of 1980 to clarify the conveyance and ownership of submerged lands by Alaska Natives, Native Corporations and the State of Alaska, having considered the same, reports favorably thereon without amendment and recommends that the Act do pass.

PURPOSE OF THE MEASURE

The primary purpose of H.R. 2629, as ordered reported, is to amend the Alaska National Interest Lands Conservation Act of 1980 to clarify the conveyance and ownership of submerged lands by Alaska Natives, Native Corporations and the State of Alaska. The legislation also prohibits the Secretary from conveying, by exchange or other means, any lands or interests in lands within the coastal plain of the Arctic National Wildlife Refuge (ANWR) without the prior approval of Congress; and approves Public Land Order Numbered 6607 of July 8, 1985, thereby adding approximately 325,000 acres of land to the ANWR.

19-010

S313-7

BACKGROUND AND NEED

TITLE I—SUBMERGED LANDS

Title I of H.R. 2629 is intended to resolve a complex problem which has hindered the survey and conveyance of public land in Alaska—the ownership of submerged lands under the many lakes, rivers, and streams of Alaska and how that acreage is conveyed and "charged" against the entitlement of the State pursuant to its Statehood Act and Alaska Native Corporations pursuant to the Alaska Native Claims Settlement Act.

A thorough discussion of the background and history of the submerged lands issue in Alaska is included in House Report 100–262 Part I.

During the Committee's hearings on H.R. 2629, two amendments were proposed for the Committee's consideration by representatives of Alaska Native Corporations. The Committee decided both amendments were unnecessary because existing provisions of law are adequate. One amendment would have specifically authorized the Secretary to exchange additional subsurface lands within Conservation System Units made available under this act for lands outside such units. The Committee believes such authority already exists under section 22(f) of ANCSA.

The second amendment would have ensured that if a Native Corporation loses acreage charged to it because of court decisions setting different criteria for determination of navigability, the corporation would have the right to replace that acreage through additional selections and conveyances. The Committee believes that section 22(j) of ANCSA clearly protects the Native Corporation's full entitlement.

It should be noted that section 901(b)(2) ratifies the terms and conditions of a referenced "memorandum of Agreement" between the Governor of Alaska and the Secretary of the Interior. That memorandum is included as "Appendix A" of this report.

TITLE II—CONVEYANCES IN ANWR

The Department of the Interior (DOI) and several Alaska Native corporations (Corporations) have entered into a tentative agreement whereby DOI would exchange oil and gas interests in certain tracts within the Coastal Plain of the Arctic National Wildlife Refuge (ANWR) for certain Corporation surface estate lands in several Alaska national wildlife refuges. The proposal calls for approximately 891,000 acres of Corporation refuge inholdings to be exchanged for approximately 166,000 acres of federal oil and gas interests. The land and interests to be exchanged are valued by DOI at $538.7 million.

It is the Committee's understanding that the Department is currently preparing a legislative environmental impact statement on these exchanges. The Committee has not considered these proposed exchanges and takes no position regarding the merits of such proposals. The Committee feels strongly, however, that no exchange or conveyance should be undertaken in this important area unless approved, in advance, by an Act of Congress. The Congress clearly reserved to itself the right to decide if and when oil and gas leasing

would be permitted in ANWR. This legislation would insure that such a congressional prerogative is preserved.

In several recent appearances before the Committee, Secretary Hodel has expressed his view that any exchange involving lands in ANWR would not be undertaken without prior Congressional approval. The Committee commends the Secretary for his position on this matter and notes that this bill is consistent with his views.

TITLE III—APPROVAL OF PUBLIC LAND ORDER

The present boundaries of the ANWR were established by ANILCA in 1980. The boundaries established by that Act represented a considerable southerly expansion of the refuge from that which existed prior to 1980.

Included in the land brought within the new boundaries of ANWR in 1980 were lands which had been the subject to selections by the State of Alaska pursuant to the Alaska Statehood Act. These selections were based on the possibility of locating a natural gas pipeline corridor south of the then-existing boundaries of the refuge.

In September 1983, the State of Alaska relinquished its selection rights to these lands (totaling approximately 1.3 million acres), which were surrounded on three sides by the ANWR and which bordered Canada on the fourth side. The Department of the Interior has determined that approximately 971,800 acres involved in the State's relinquishment were automatically added to the refuge pursuant to Section 103(i)(2) of ANILCA.

However, the remaining lands affected by the State's relinquishment were determined not to be valid State selections. Accordingly, on June 28, 1985, an Assistant Secretary of the Interior notified Chairman Udall of the House Interior and Insular Affairs Committee that the Department intended to withdraw those remaining lands, and another parcel of adjacent lands which had not been subject to State selection, from operation of the mining laws (but not the mineral leasing laws) and assign them to the U.S. Fish and Wildlife Service for management as part of ANWR.

Public Land Order 6607 (dated July 8, 1985) accomplished this withdrawal. Consistent with section 1326(a) of ANILCA, a Joint Resolution approving Public Land Order 6607 was passed by the House on December 8, 1985, but the Senate did not complete action thereon. Title III is intended to remove any doubts about the status of lands described in the Public Land Order, which total about 325,000 acres.

LEGISLATIVE HISTORY

H.R. 2629 passed the House of Representatives by voice vote on August 3, 1987. A Senate companion measure, S. 576, was introduced by Senators Murkowski and Stevens on February 23, 1987. A hearing on both measures was held by the Public Lands, National Parks and Forests Subcommittee on October 20, 1987.

At a business meeting on March 2, 1988, the Senate Committee on Energy and Natural Resources ordered H.R. 2629, favorably reported.

Committee Recommendations and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on March 2, 1988, by a majority vote of a quorum present, recommends that the Senate pass H.R. 2629, as described herein.

The rollcall vote on reporting the measure was 15 yeas, 1 nay as follows:

YEAS	NAY
Mr. Johnston	Mr. Metzenbaum *
Mr. Ford	
Mr. Melcher	
Mr. Bradley	
Mr. Fowler	
Mr. Conrad *	
Mr. McClure	
Mr. Hatfield *	
Mr. Weicker *	
Mr. Domenici *	
Mr. Wallop	
Mr. Murkowski	
Mr. Nickles	
Mr. Hecht	
Mr. Evans	

* Indicates voted by proxy.

Cost and Budgetary Considerations

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 7, 1988.

Hon. J. Bennett Johnston, Jr.,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 2629, an act to amend the Alaska National Interest Lands Conservation Act of 1980 to clarify the conveyance and ownership of submerged lands by Alaska Natives, Native Corporations and the State of Alaska. The legislation was ordered reported by the Senate Committee on Energy and Natural Resources on March 2, 1988.

Title I of H.R. 2629 would approve and clarify an agreement between the Department of the Interior, the State of Alaska, and Alaska Native groups regarding land surveying and conveyances in the State of Alaska. Title II would prohibit the Secretary of the Interior from conveying or exchanging federal lands in the Arctic National Wildlife Refuge (ANWR) without the prior approval of the Congress. Title III would approve an Interior Department order assigning certain lands to the U.S. Fish and Wildlife Service for management as part of ANWR.

We estimate that, relative to current law, enactment of this legislation would result in no cost or savings to the federal government or to state or local governments. If the Congress acts in the future to allow oil and gas leasing in ANWR, H.R. 2629, by prohibiting the exchange of ANWR land, would ensure that any receipts generated from such leasing activity would accrue to the federal government.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 2629. The Act is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork will result from the enactment of H.R. 2629, as reported.

EXECUTIVE COMMUNICATIONS

On September 30, 1987, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on H.R. 2629. These reports had not been received at the time the report on H.R. 2629 was filed. When the reports become available, the chairman will request that they be printed in the Congressional Record for the advice of the Senate.

Following is the Department of the Interior's statement at the October 20, 1987 subcommittee hearing:

OCT 20 1987

STATEMENT OF ROBERT F. BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, ON H.R. 2629, AN ACT "TO AMEND THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT OF 1980 TO CLARIFY THE CONVEYANCE AND OWNERSHIP OF SUBMERGED LANDS BY ALASKA NATIVES, NATIVE CORPORATIONS, AND THE STATE OF ALASKA."

I appreciate the opportunity to appear before the Subcommittee today to discuss the Department of the Interior's position on the House-passed version of H.R. 2629.

We favor enactment of H.R. 2629.

Section 101 of H.R. 2629 would strike out the text of section 901 of the Alaska National Interest Lands Conservation Act of 1980, generally referred to as ANILCA, and insert new language in its place. In rewriting section 901, H.R. 2629 would eliminate the provisions relating to the statute of limitations for the filing of civil actions concerning 1) the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to either ANILCA or the Alaska Native Claims Settlement Act of 1971 (ANCSA), or 2) a decision by the Secretary of the Interior that the water covering such parcel is not navigable.

Section 901(a)(1) as rewritten in H.R. 2629 would establish the requirements for, and the procedures to be used in, "meandering" lakes, rivers and streams, whenever the Secretary surveys lands selected by an Alaskan Native, a Native Corporation, or the State, pursuant to ANCSA, the Alaska Statehood Act, or ANILCA.

Under Section 901(a)(2) meandering would not be required for lakes less than 50 acres and streams less than 3 chains in width if title to the lands beneath navigable waters did not vest in the State pursuant to the Submerged Lands Act.

Section 901(a)(3) would provide that the Secretary not be required to determine navigability of a lake, river, or stream large enough to be meandered, and that he not be required to compute the acreage of such land or describe such land in a conveyance document.

Section 901(a)(4) would provide that nothing in the section shall be construed to require ground surveys or monumentation of meander lines.

Section 901(b)(1) would provide that whenever the Secretary, pursuant to ANCSA, ANILCA, or the Alaska Statehood Act, conveys to an Alaska Native, a Native Corporation, or the State, land which abuts or surrounds a meanderable lake, river or stream, all right, title and interest of the United States, if any, in the land under such lake, river, or stream lying between the uplands and the median line or midpoint shall vest in and shall not be charged against the acreage entitlement of such Native or Native Corporation or the State. This paragraph also provides that the right, title and interest vested in such Native or Native Corporation shall be no greater an estate than the estate he or it is conveyed in the land which abuts or surrounds the lake, river, or stream.

Section 901(b)(2) would incorporate into section 901 the provisions of the March 28, 1984, Memorandum of Agreement between the Department of the Interior and the State of Alaska and would ratify it as to the duties and obligations of the United States, as a matter of Federal law.

Section 901(c)(1) would provide that execution of an interim conveyance or patent by BLM for land selected by a Native or a Native Corporation which includes, surrounds or abuts a lake, river, or stream, or any portion thereof, would be the final agency action with respect to navigability, unless such decision was validly appealed on or before December 2, 1980.

Section 901(c)(2) would provide that no agency other than the BLM would have authority to determine navigability of lakes, rivers, or streams within an area selected by a Native or Native Corporation, unless such determination was validly appealed on or before December 2, 1980.

Section 901(c)(3) would provide for awarding attorney's fees and costs against the plaintiff in favor of a successful Native Corporation when, pursuant to ANCSA or ANILCA, as amended by H.R. 2629, conveyances of lands which underlie a lake, river, or stream are challenged in a court of competent jurisdiction.

Section 901(d) retains the current definitions of 'navigable' and 'navigability'.

Section 102 of H.R. 2629 would provide that nothing in H.R. 2629 shall amend or alter any land exchange agreement to which the United States is a party, or any statute that authorizes, ratifies or implements such an agreement.

Section 201 would add a new subsection (2) to section 1302(h) of ANILCA which would prohibit the Secretary of the Interior from conveying, by exchange or other means, any lands or interests in lands within the coastal plain of the Arctic National Wildlife Refuge (ANWR), other than land validly selected prior to July 28, 1987, without prior approval of Congress.

Section 301 would include approximately 325,000 acres of land described in Public Land Order 6607 of July 8, 1985, as part of the Arctic National Wildlife Refuge. The lands would be administered in accordance with the provisions of sections 303(2) and 304 of ANILCA and other applicable statutes.

H.R. 2629 would make section 901 of ANILCA conform to the policy adopted by the Department of the Interior and agreed to by the State of Alaska and Native Corporations, concerning the ownership of, and chargeability for, submerged lands.

To add perspective to H.R. 2629, I will briefly sketch out the historical background of the Department of the Interior's current policy on submerged lands.

Since the passage of the Act of May 18, 1796, it has been the law that the title to lands bordering on nonnavigable streams extends to the center of the streams. Further, in 1891, in the case of Hardin v. Jordan, 140 U.S. 371, the Supreme Court decided that the title of grantees of lands bordering on nonnavigable lakes or ponds extends to the center of the lake or pond. The

Department has applied these principles consistently to land conveyances in both the lower 48 states and Alaska, except as to selections by the State of Alaska under the Alaska Statehood Act and to selections by Native Corporations under the Alaska Native Claims Settlement Act.

Thus, when a State or other entity, other than the State of Alaska or a Native Corporation, was entitled to select a certain amount of land which included land covered by nonnavigable waters, the grantee was not charged for the submerged lands when the acreage of the remaining entitlement was calculated. This longstanding policy is reflected in the Bureau of Land Management's (BLM) Manual of Surveying Instructions (Manual), which includes instructions for meandering rivers and lakes and calculating the acreage of fractional sections. The Manual provides that navigable bodies of water, as well as all lakes equal to or larger than 50 acres, and streams and rivers equal to or wider than 3 chains (198 feet), are to be excluded from the public lands.

Section 6 of the Alaska Statehood Act allowed the State of Alaska to select 103.35 million acres of vacant, unappropriated, unreserved public land. That Act also provided that the State took title to submerged lands beneath navigable waters that had not been reserved to the United States under the Submerged Lands Act or other law. However, section 6(g) of the Alaska Statehood Act provides that where lands selected by the State are unsurveyed, the Secretary of the Interior is to survey the exterior boundaries of the selected area and issue a patent for such selected area in terms of the exterior boundary survey. In accordance with this instruction, BLM surveyed only the perimeter of the State's selections and did not meander the submerged lands within the selected areas.

Under ANCSA, Native Corporations were entitled to select 44 million acres of public lands. In this context, the Department interpreted the term "public lands" to include submerged lands beneath nonnavigable waters.

A final determination as to the navigability of a body of water can only be made by a court, and such judicial determinations have never been issued on the overwhelming majority of lakes and rivers in Alaska. Thus, BLM, in its efforts to convey the lands that have been selected by the State and the Native Corporations, has been required to make initial determinations as to the navigability of hundreds of lakes and rivers.

If BLM found that a body of water within a Native selection was navigable, the land underlying the waterbody was held to belong to the State and was not charged against the Native Corporation's entitlement. If the waterbody was found to be nonnavigable, the selected lands were conveyed to the Native Corporation and charged against its entitlement - an apparent contradiction of the Department's longstanding policy in the lower 48 states. Similarly, when the State made selections of lands containing nonnavigable bodies of water, BLM charged the submerged lands against the State's entitlement.

As a result, the navigability and nonnavigability of water bodies, and the chargeability of submerged land have been issues of contention since the enactment of the Alaska Statehood Act and ANCSA. In particular, the State believes that many of the submerged lands that have been conveyed to the Native Corporations should have been recognized as belonging to the State. Native Corporations have found it necessary to challenge the initial

navigability decisions to insure that they will not be deprived of any portion of their entitlements.

Further, the State and the Native Corporations have long contended that the Manual should be followed when lands in Alaska are conveyed. The Native Corporations have also asserted that they should not be charged for federally-owned submerged lands which they have selected.

In an attempt to resolve submerged land inequities, the involved parties negotiated a change in policy concerning the chargeability of submerged lands. That policy was published in the Federal Register of December 5, 1983, and was subsequently reiterated in a March 28, 1984, Memorandum of Understanding between the State of Alaska and the Department of the Interior, and in a final rulemaking amending the provisions of the Alaska Native Selection regulations (43 CFR 2650) that was published in the Federal Register on April 19, 1985.

The basic provisions of that policy are:

- Submerged lands beneath all water bodies shall be meandered in accordance with the principles in the Bureau of Land Management's Manual of Surveying Instructions. Whenever feasible, photogrammetry is to be used in surveying meander lines and planimetry is to be used for acreage computations of the upland lots on plats of survey.

- Alaska Native Corporations and the State shall not be charged for submerged lands beneath water bodies that are meandered in accordance with the new policy (i.e., in accordance with the Manual or subsequent regulations);

- Those beds of tidal waters which were reserved to the United States at the time of statehood and are less than 50 acres in size or 3 chains in width will not be meandered and will be charged against Native and State entitlements.

Implementation of this policy is having the following benefits:

- The Native Corporations and the State are not receiving less land than Congress specified, since there is no charge for submerged lands that are meandered.

- Treatment of landowners in Alaska is consistent with the treatment of landowners in the lower 48 states.

- There is less likelihood that protracted litigation will occur, thus reducing delays in issuing conveyances.

- Since the State, the Native Corporations, and the Department of the Interior have concurred in the new policy, a major source of friction has been removed.

Some problems concerning navigability decisions were addressed by the Congress in section 901 of ANILCA, which established time frames and procedures for challenging such decisions. Specifically, section 901(a) provided that the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to either ANILCA or ANCSA, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to a judicial determination unless a civil action is filed in the United States District Court within 5 years after the date of the execution of the involved conveyance, if the conveyance was executed after December 2, 1980, the date of enactment of ANILCA. A 7-year statute of limitations applied if the conveyance or patent was executed before the date of enactment of ANILCA.

Although the Department's current policy concerning the chargeability of submerged lands has eliminated many of the problems associated with conveyances of selected lands in Alaska, the problem concerning navigability decisions remains unresolved. At issue are BLM's navigability decisions, and their effect on hundreds of conveyances made to Native corporations and the State.

The 5-year statute of limitations established by section 901(a), as originally enacted, began to run on December 2, 1985. Enactment of P.L. 99-644 extended the statute to 8 years and also extended the 7-year time limit to 9 years. Thus, the State must either challenge all the conveyances that are subject to the 8-year statute of limitations, or risk the possibility of being precluded from challenging some of the conveyances and decisions. H.R. 2629 does not contain any time limitations.

As I said earlier, we favor enactment of H.R. 2629 because it enacts into law the current policy of the Administration with regard to submerged lands in Alaska and may eliminate the possibility of much litigation.

Section 201 of H.R. 2629 would add a new subsection to section 1302(h) of ANILCA to express the necessity for Congressional approval of any conveyance of lands within the coastal plain of the Arctic National Wildlife Refuge (ANWR) other than lands validly selected before July 28, 1987. We have repeatedly stated that we will not allow any exchanges in the coastal plain without Congressional approval and we have no objection to this provision. However, we point out a technical problem with the amendment as currently written. ANILCA permitted the Secretary to exchange all the lands the Kaktovik Inupiat Corporation (KIC) received outside ANWR for lands to be selected inside ANWR adjacent to lands already conveyed to it. We arranged that exchange and, before July 28, 1987, KIC selected everything to which it believed it was entitled. The present provision in section 201 that protects valid selections made before July 28, 1987, would seem to have protected KIC's right to have the United States convey to it the remainder of its land entitlement. However, more land has been lost to KIC through adjustments in surveys, State claims or allotments. Therefore, there might not be enough selections of record to meet KIC's land entitlement. Thus, section 201 of the bill might be considered to create an additional barrier to conveyance to KIC.

This concludes my prepared statement. I will be pleased to answer questions.

MINORITY VIEWS OF SENATOR METZENBAUM

I remain strongly opposed to H.R. 2629.

If this bill is enacted, the Nation will lose at least 1.8 million acres—possibly more—of public land in Alaska. The State of Alaska will take 700,000 acres, while Alaska Native corporations will be conveyed 1.1 million acres, including 712,000 acres in the national wildlife refuges and parks of Alaska. These new land selections are in addition to the State and native land grants of 105 and 44 million acres, respectively.

This bill would have a devastating impact on the public lands of Alaska:

—cancellation of public use and enjoyment of the 1.1 million acres that would go into private ownership, including the fishing, hunting, wildlife viewing, habitat protection, wilderness appreciation, and all other public uses now freely available and cherished by all Americans;

—loss of 1.8 million acres of public land and resources worth an undetermined amount, but possibly in the range of hundreds of millions of dollars, depending on what resources are present;

—creation of 713,000 acres of new private lands inside the national wildlife refuges and parks, in direct opposition to congressional efforts to acquire inholdings in conservation system units;

—fragmentation of the BLM lands by another 1.1 million acres of selections, thereby hindering BLM's efforts to retain coherent management units;

—a probable need for Congress to appropriate millions of dollars to reacquire former public lands essential to the management of the National Conservation System and BLM units.

H.R. 2629 would ratify a submerged lands conveyance procedure adopted in 1983 by former Interior Secretary James Watt and now under court challenge. Under his policy, land beneath lakes 50 acres or larger and streams with beds 198 feet or wider would be conveyed to the State and the Native corporations but not counted against their land grants. This would allow them to make additional selections to complete their grants, and result in the 1.8 million acres going out of Federal ownership.

In adopting the Watt policy, this bill would reverse the Interior Department's long-standing interpretation of section 6 of the 1959 Alaska Statehood Act, section 13 of the 1971 Alaska Native Claims Settlement Act [ANCSA], and section 901 of the 1980 Alaska National Interest Lands Conservation Act [ANILCA]. Until former Secretary Watt's 1983 action, all federally owned submerged lands were counted against the State and Native land grants in the same manner as federally owned uplands.

During our drafting of the Alaska Lands Act legislation, we considered virtually the same submerged lands conveyance policy em-

bodied in the Watt regulations and now in this bill. We rejected it then in favor of sec. 901, the submerged lands provision of the Alaska Lands Act, because it would have increased the State and Native land grants at the expense of the public lands, including some we designated as national wildlife refuges, national parks, and other national interest lands.

Proponents of H.R. 2629 offer three arguments in favor of their bill. First, they say that unless sec. 901's statute of limitation on State lawsuits is repealed, the State will file hundreds of lawsuits against the Native corporations before the deadlines are reached. This in turn would needlessly burden the Native corporations, and overload the Federal court system in Alaska.

The State's threat of massive litigation is probably a bluff, and in the unlikely event such cases were filed the court would probably consolidate them in a few test cases. In any event, I have no objection to repealing the statute of limitation. The question of time limits has always been a matter between the State and the Natives, and now both agree that the limits can be lifted.

A second argument is that unless the Watt policy is ratified the Native land entitlement is at risk, as Senator Murkowski has stated in his remarks introducing his companion bill to H.R. 2629. The proponents are suggesting that if the State successfully challenges a Native corporation's ownership of submerged lands, and the State becomes the owner pursuant to the Submerged Lands Act, then the Native corporation's ANCSA grant shrinks by the amount of submerged lands transferred to the State.

Their argument is incorrect. Congress granted Alaska Natives 44 million acres in settlement of aboriginal land claims; it did not grant this acreage subject to reductions caused by possible State takeovers of Native-owned submerged lands. The Alaska Native Claims Settlement Act guarantees the Native entitlement.

Moreover, in section 1410 of the Alaska Lands Act, we provided for additional village corporation selections in the event a village is "underselected," i.e., has not selected its total entitlement. Sec. 1410 would apply if the State takes ownership of submerged lands away from a village corporation and causes it to be underselected. Sec. 1410 can easily be amended to also cover potential underselections by the native regional corporations.

The third argument used by proponents of this bill is that the Watt policy is used for conveying public lands in the other States, and that as a matter of equity it ought to be applied to conveyances in Alaska as well.

We considered this equity argument when drafting the submerged lands provision of the Alaska Lands Act (sec. 901). We found the argument flawed because it oversimplified the situation in Alaska as compared to the other public land States. In the latter, the States could select only sections 16 and 32 of available federally owned townships. In Alaska, the new State was given a massive quantity grant of 105 million acres onshore, and millions of acres of submerged lands off the Nation's longest coastline. Much of what the State owns is resource-rich, such as the oil and gas fields at Prudhoe Bay (including on State-owned submerged lands offshore) worth approximately 30 billion dollars to the State so far.

If Alaska had been treated equally with the other public land States by being given selection rights to only two sections per township. Its land grant would have been about a fifth of the 105 million acres it has received.

Similarly, Alaska Natives have benefited by the largest land grant ever provided to any native Americans, as well as a cash payment of nearly $1 billion (half of it by the State). The 44-million-acre ANCSA grant, comprising some of the finest lands in Alaska, is slightly larger than the State of Washington, and is larger than the sum of all the other tribally owned lands in the other States. It is larger than all the New England States combined, with 3.6 million acres left over for good measure.

Thus the assertion by the proponents of this bill that Congress has been unfair to the State and Alaska Natives by using a different approach to submergd lands conveyances is refuted by our exceptionally generous and fair land policy to these parties over the years.

Against this background of fairness and generosity toward Alaska and Alaska Natives, we adopted sec. 901 of the Alaska Lands Act because to do otherwise would have been to needlessly sacrifice public lands, including national interest lands of inestimable value to the American people.

I believe we were right then, and I urge my colleagues to once again reject a submerged lands policy that is so contrary to the national interest.

At the same time as Congress has been considering H.R. 2629, which would repeal Sec. 901 of ANILCA, there is a pending legal challenge to former Secretary Watt's 1983 attempt to repeal the section by administrative fiat.

In 1984 the wilderness society and the Sierra Club sued the Department of the Interior in Federal district court, arguing that the Department's historical interpretation of the Statehood Act, ANCSA, and ANILCA had been correct, and that submerged lands cannot be conveyed without charge pursuant to those statutes.

The district court denied the plaintiffs access to any BLM documents regarding the new submerged lands policy, and then dismissed the case for lack of standing, holding that the environmental groups had failed to prove that they are injured by the new policy. The D.C. circuit court of appeals reversed the district court, and the case is now pending again before the district court.

Under direction by the court of appeals, the district court this time has allowed plaintiffs to discover documents from BLM to prove its injury, and the discovery process is almost complete. Briefing is to be completed in May, 1988. The district court will then be prepared to consider the merits of the law suit for the first time, and to give a definitive interpretation of the three basic Alaska land laws.

In these circumstances, there is no need for congressional action This bill would only interfere with the resolution of a legal dispute between the parties that the courts are fully qualified to decide, and—speaking of fairness—would unfairly take the side of the proponents of the bill. Congress already had addressed the issue of submerged lands adequately, definitively, and fairly in Sec. 901 of

the Alaska Lands Act. There is no need to revisit the issue when it can and will be decided by the judicial system.

In summary, given the importance of the public lands in Alaska to the people of this Nation, I urge my colleagues to vote this bill down, and let the courts decide the issue.

HOWARD M. METZENBAUM.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, H.R. 2629, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

(P.L. 96-487, 94 Stat. 2371)

* * * * * * *

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

[SUBMERGED LANDS STATUTE OF LIMITATIONS

[SEC. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

[(b) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to the date of enactment of this Act.

The execution of an interim conveyance or patent (whichever is executed first) by the Bureau of Land Management conveying a parcel of submerged land to a Native Corporation or Native Group shall be the final agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable, unless such decision was validly appealed prior to the date of enactment of this Act to an agency or board of the Department of the Interior other than the Bureau of Land Management.

[(c) if the court determines that a parcel of submerged land which is the subject of a civil action described in subsection (a) is owned by the Native Corporation or Native Group to which it was conveyed pursuant to the Alaska Native Claims Settlement Act or this Act, each defendant Native Corporation and Native Group shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

[(d) No Native Corporation or Native Group shall be determined to have been conveyed its acreage entitlement under the Alaska Native Claims Settlement Act until—

[(1) the statutes of limitation set forth in subsection (a) have expired with respect to every parcel of submergerd land conveyed to such Corporation or Groups; and

[(2) a final judgment or order not subject to an appeal has been obtained in every civil action filed pursuant to subsection (a).

[(e)(1) Whenever a parcel of submerged land to be conveyed to a Native Corporation or Native Group is located outside the boundaries of a conservation system unit such Corporation or Group and the State of Alaska may mutually agree that such parcel may be selected by and conveyed to the state under the provisions of section 6(b) of the Alaska Statehood Act.

[(2) In any instance in which the State could have selected a parcel of submerged land pursuant to an agreement between the State and a Native Corporation or Native Group pursuant to paragraph (1) is such parcel had not previously been conveyed to such Corporation or Group, such Corporation or Group is authorized to reconvey such parcel to the Secretary, and the Secretary shall accept such reconveyance. If the surface estate and subsurface estate of such parcel are owned by different Native Corporations or Native Groups, every Corporation and Group with an interest in such parcel shall reconvey its entire interest in such parcel to the Secretary.

[(3) In any agreement made between a Native Corporation or Native Group and the State of Alaska pursuant to paragraph (1), and in any reconveyance executed by a Native Corporation or Native Group pursuant to paragraph (2), each affected Corporation or Group shall disclaim its interest in the parcel which is the subject of the agreement or reconveyance. If such parcel underlies a lake having a surface area of fifty acres or greater or a stream having a width of three chains or greater, the Secretary shall determine the acreage contained in the parcel. If such parcel underlies a lake having a surface area of less than fifty acres or a stream having a width of less than three chains, the Secretary, the State, and the affected Native Corporation or Native Group shall deter-

mine the acreage contained in the parcel by mutual agreement. The affected Native Corporation or Native Group shall receive replacement lands in an amount equal to the acreage of the parcel as determined by the processes set forth in this paragraph.

[(4) Upon receipt by the Secretary of an agreement executed pursuant to paragraph (1) or a reconveyance executed pursuant to paragraph (2), the parcel shall be deemed vacant, unappropriated, and unreserved public land available for selection by the State pursuant to section 6 of the Alaska Statehood Act, and the State is authorized to file a land selection application for such parcel pursuant to section 6(b) of the Alaska Statehood Act. The acreage within such parcel shall be charged against the State's land entitlement. If the water covering a parcel of submerged land selected by or conveyed to the State pursuant to this subsection is later determined (without regard to the statutes of limitation contained in this section) by a court of competent jurisdiction to be navigable and title to such parcel to be vested in the State pursuant to section 6(m) of the Alaska Statehood Act, such selection or conveyance shall not diminish the State's land entitlement under section 6(b) of the Alaska Statehood Act, nor shall such judicial determination of navigability affect the land entitlement of any Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act land selections made by the State pursuant to this subsection shall not be subject to the size limitation of section 6(g) of the Alaska Statehood Act or this Act. Notwithstanding the survey requirements of section 6(g) of the Alaska Statehood Act and section 13 of the Alaska Native Claims Settlement Act, no ground survey or monumentation shall be required on any parcel selected by and conveyed to the State or excluded from a conveyance to any Native Corporation or Native Group pursuant to this subsection.

[(5) Any Native Corporation or Native Group which is entitled to receive conveyance of replacement acreage in lieu of acreage within a parcel of submerged land relinquished or reconveyed pursuant to this subsection shall receive conveyance of such replacement acreage from among existing selections made by such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act. If such selections are insufficient to fulfill the acreage entitlement of such Corporation or Group pursuant to the Alaska Native Claims Settlement Act, the provisions of section 1410 shall apply to such Corporation or Group, but no land within the boundaries of a conservation system unit shall be withdrawn for such Corporation or Group pursuant to section 1410 unless such land was withdrawn under section 11(a) of the Alaska Native Claims Settlement Act. Any replacement acreage conveyed to a Native Corporation or Native Group from lands withdrawn pursuant to selection 1410 shall be subject to the provisions of sections 12, 14, 16, 17, and 22 of the Alaska Native Claim Settlement Act.

[(f) The procedures and statutes of limitation set forth in the section shall not apply to administrative or judicial determinations of the navigability of water covering a parcel of submerged land other than a parcel conveyed to a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act or this Act.

[(g) As used in this section, the terms "navigable" and "navigability" mean navigable for the purpose of determining the title to lands beneath navigable waters, as between the United States and the several States, pursuant to the Submerged Lands Act of 1953 (67 Stat. 29), and section 6(m) of the Alaska Statehood Act.

[(h) Notwithstanding any other provision of law, any civil action contesting the legality or authority of the United States to legislate on the subject matter of this section shall be barred unless the complaint is filed within one year after the date of enactment of this Act. The purpose of this limitation on suits is to ensure that, after the expiration of a reasonable period of time, the right, title, and interest of Native Corporations and Native Groups in submerged lands conveyed to them under the Alaska Native Claims Settlement Act and this Act will vest with certainty and finality and may be relied upon by such Corporations or Groups and all other persons in their relations among themselves and with the State and the United States.]

SEC. 901. (a)(1) Except as provided in paragraph (2), whenever the Secretary surveys land selected by a Native, a Native Corporation, or the State pursuant to the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or this Act, lakes, rivers, and streams shall be meandered in accordance with the principles in the Bureau of Land Management, "Manual of Surveying Instructions" (1973).

(2) If title to lands beneath navigable waters of a lake less than fifty acres in size or a river or stream less than three chains in width did not vest in the State pursuant to the Submerged Lands Act, such lake, river, or stream shall not be meandered.

(3) The Secretary is not required to determine the navigability of a lake, river, or stream which because of its size or width is required to be meandered or to compute the acreage of the land beneath such lake, river, or stream or to describe such land in any conveyance document.

(4) Nothing in this subsection shall be construed to require ground survey or monumentation of meanderlines.

(b)(1) Whenever, either before or after the date of enactment of this section, the Secretary conveys land to a Native, a Native Corporation, or the State pursuant to the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or this Act which abuts or surrounds a meanderable lake, river, or stream, all right, title, and interest of the United States, if any, in the land under such lake, river, or stream lying between the uplands and the median line or midpoint, as the case may be, shall vest in and shall not be charged against the acreage entitlement of such Native or Native Corporation or the State. The right, title, and interest vested in a Native or Native Corporation shall be no greater an estate than the estate he or it is conveyed in the land which abuts or surrounds the lake, river, or stream.

(2) The specific terms, conditions, procedures, convenants, reservations, and other restrictions set forth in the document entitled, "Memorandum of Agreement between the United States Department of the Interior and the State of Alaska" dated March 28, 1984, signed by the Secretary and the Governor of Alaska and submitted to the Committee on Interior and Insular Affairs of the House of Representatives, and the Committee on Energy and Natural Re-

sources of the Senate, are hereby incorporated in this section and are ratified as to the duties and obligations of the United States and the State, as a matter of Federal law.

(C)(1) The execution of an interim conveyance or patent, as appropriate, by the Bureau of Land Management which conveys an area of land selected by a Native or Native Corporation which includes, surrounds, or abuts a lake, river, or stream, or any portion thereof, shall be the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable, unless such decision was validly appealed to an agency or board of the Department of the Interior on or before December 2, 1980.

(2) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of a lake, river, or stream within an area selected by a Native or Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act unless a determination by the Bureau of Land Management that such lake, river, or stream, is or is not navigable, was validly appealed to such agency or board on or before December 2, 1980.

(3) If title to land conveyed to a Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act which underlies a lake, river, or stream is challenged in a court of competent jurisdiction and such court determines that such land is owned by the Native Corporation, the Native Corporation shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

(d) For the purposes of this section, the terms "navigable" and "navigability" means navigable for the purpose of determining title to lands beneath navigable waters, as between the United States and the several States pursuant to the Submerged Lands Act and section 6(m) of the Alaska Statehood Act.

* * * * * * *

TITLE XIII—ADMINISTRATIVE PROVISIONS

* * * * * * *

LAND ACQUISITION AUTHORITY

SEC. 1302. (a) GENERAL AUTHORITY.—Except as provided in subsections (b) and (c) of this section, the Secretary is authorized, consistent with other applicable law in order to carry out the purposes of this Act, to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit other than National Forest Wilderness.

* * * * * * *

(h)(*1*) EXCHANGE AUTHORITY.—Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups, Village Corporations, Re-

gional Corporations, and the Urban Corporations, and other municipalities and corporations or individuals, the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act), or any Federal agency. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value.

(2) Nothing in this Act or any other provision of law shall be construed as authorizing the Secretary to convey, by exchange or otherwise, lands or interest in lands within the coastal plain of the Arctic National Wildlife Refuge (other than land validly selected prior to July 28, 1987), without prior approval by Act of Congress.

APPENDIX A

MEMORANDUM OF AGREEMENT BETWEEN U.S. DEPARTMENT OF THE INTERIOR AND STATE OF ALASKA

This Agreement, entered into this 28th day of March 1984, is between the State of Alaska ("State"), acting through the Governor of the State of Alaska, and the United States Department of the Interior ("DOI"), acting through the Secretary of the Interior ("Secretary"). The State and DOI are referred to as "the parties".

Whereas, the Secretary has modified the practice of DOI of surveying meanderable water bodies and charging the acreage against the State's land entitlement under the Alaska Statehood Act, as amended; and

Whereas, the State believes that, as a matter of law, DOI is required to determine meanders of water bodies and segregate water bodies from surveys of the public lands, in accordance with the principles contained in the Bureau of Land Management ("BLM") "Manual of Surveying Instructions, 1973" ("the Manual"), as the basis for determining acreage chargeability for land conveyed to the State under the Alaska Statehood Act, as amended; and

Whereas, DOI believes that it is not bound by the provisions of the Manual as the basis for determining acreage chargeability for land conveyed to the State under the Alaska Statehood Act, as amended; and

Whereas, there is a need and the parties desire to agree on the method of surveying land and determining acreage chargeability in order to reach a mutually acceptable compromise and settlement of this issue to minimize the possibility of future litigation between the parties and to expedite land conveyances to the State under the Alaska Statehood Act, as amended.

Now therefore: In consideration of their mutual promises, the parties covenant and agree as follows:

1. a. For any approved plat of survey on which patent was issued to the State prior to December 5, 1983, and meanderable water bodies were not segregated from the survey but were included in the calculation of acreage to be charged against the State's land entitlement, the chargeable acreage may be recalculated, at the State's expense, to conform to the principles contained in the Manual, as modified by this agreement. Pursuant to such principles, the acreage of meanderable water bodies shall not be included in the acreage charged against the State's land entitlement. Acreage recalculations under this paragraph shall be based upon the meanders shown on the approved plat of survey, except that in the case of identified gross error or approved protracted plats, acreage

recalculations may be based upon enlarged township diagrams showing the meanders prepared using the most recent rectified photography, U.S.G.S. mapping, or any other method mutually agreed upon by the parties. Acreage recalculations shall be performed by the State, subject to the Secretary's review and verification of accuracy and subject to the provisions of paragraph 1.c. of this agreement. If the State so desires, and the Secretary agrees, the Secretary may perform acreage recalculations subject to the provisions of paragraph 1.c. of this agreement.

b. Within one hundred twenty (120) days after the State has completed an acreage recalculation and submitted it to the Secretary, the Secretary shall review the State's acreage recalculation, including the methodology used in preparing the recalculation, shall verify the accuracy of the acreage recalculation and shall notify the State of the findings. After verification of the accuracy of an acreage recalculation performed by the State, or upon approval of an acreage recalculation performed by the Secretary, the official BLM records shall be documented to reflect the acreage recalculation and the State so notified. If the Secretary determines that an acreage recalculation performed by the State is not accurate, the State shall recalculate the acreage until the State's recalculation is accepted by the Secretary or the State accepts the Secretary's acreage recalculation.

c. The State shall submit to the Aslaska State Director, Bureau of Land Management ("BLM State Director"), at least ninety (90) days prior to the beginning of the Federal fiscal year, a specific list of acreage recalculations, if any, identified by patent number, intended to be completed during the subsequent fiscal year. For the current fiscal year, this list shall be submitted within ninety (90) days of the date of this agreement. Within forty-five (45) days from receipt of the State's list, the BLM State Director shall provide the State a written estimate of costs to be paid to BLM by the State for the work which BLM will complete pursuant to this paragraph during the subsequent Federal fiscal year. The costs to be paid by the State shall include the direct costs (including overhead costs) and indirect costs incurred by BLM in preparing enlarged township diagrams, recalculating acreage based upon enlarged township diagram or approved plats of survey, reviewing and verifying acreage recalculations performed by the State, notifying the State of the results of acreage recalculations performed by the Secretary or reviews of acreage recalculations performed by the State, noting the results of the verified and approved acreage recalculations in the official BLM records and other costs incurred by the Secretary pursuant to this paragraph which are not expressly agreed to be paid by the United States. The State shall remit the estimated amount of the costs to the BLM State Director prior to the beginning of the Federal fiscal year. Payments made by the State shall be considered payments under Section 307(c) of the Federal Land Policy and Management Act. The BLM State Director or his designeee shall, from time to time during the fiscal year, review actual costs and payments received to assure that sufficient funds have been remitted to cover the costs to be paid by the State or work remaining during the fiscal year. If the BLM State Director determines that there are insufficient funds remaining, a new estimate shall be

submitted to the State for the additional amount. The State may submit a revised list of acreage recalculations to be completed during the Federal fiscal year at any time prior to June 30 of the year, but only after remitting to the BLM State Director the estimated amount of costs to be paid by the State for additional work which BLM will perform to complete the acreage recalculations on the revised list. After the end of the Federal fiscal year, the BLM State Director shall submit to the State, an accounting of all costs incurred during the previous fiscal year. The accounting shall be based on BLM's official accounting records. Within ninety (90) days after the end of the Federal fiscal year in which the work is scheduled, the BLM State Director shall refund to the State the amount of any overpayment. The State may elect to have any unexpended funds credited against future work. If there is a deficiency, the State shall pay such costs upon receipt of a notice of such deficiency from the BLM State Director.

d. The State agrees not to sue the Secretary to compel him to recalculate the chargeable acreage for patents issued prior to December 5, 1983, unless the State has complied with the procedures set forth in subparagraphs b and c, above.

e. The State agrees to identify all land it wishes to have recalculated pursuant to this Agreement no later than January 3, 1993.

2.a. For any approved plat of survey on which patent was not issued prior to December 5, 1983, and meanderable water bodies were not segregated from the survey, the acreage of meanderable water bodies appearing on the plat shall be calculated by the Secretary, at no cost to the State, and shall not be charged against the State's land entitlement. Except in the case of gross error, as identified or concurred in by the Secretary, no adjustments, additions, or deletions of water bodies shall be made on the plat for the express purpose of recalculating the acreage to be charged against the State's land entitlement.

b. Any approved protracted plat on which patent was not issued prior to December 5, 1983, shall be cancelled by the Secretary.

3. For any plat of survey approved after December 5, 1983, water bodies shall be meandered and segregated from the survey, in accordance with the principles contained in the Manual, as modified by this agreement, as the basis for determining acreage chargeability.

4. If title to lands beneath navigable waters, as defined in the Submerged Lands Act, of a lake less than 50 acres in size or a river or stream less than three chains in width did not vest in the State on the date of Statehood, such lake, river, or stream shall not be meandered.

5. The parties agree that any determinations of meanders which may be made under paragraphs 1, 2, or 3, above, shall not require mounmentation on the ground unless required by law or for good cause in the public interest.

6. The parties agree that the DOI cannot and will not administratively extend selection periods because of this agreement for grants of land made by or confirmed in the Alaska Statehood Act and DOI will oppose any legislation to do so. Notwithstanding the foregoing, the parties agree that the State retains its option to ask Congress for any extension of selection periods.

7. This agreement shall become effective only upon its execution by the parties. The parties shall be obligated to undertake good faith negotiations to resolve any perceived implementation problems during the course of this Agreement.

8. For the purpose of expediting the execution of this Agreement, it may be signed in separate counterparts by the parties, and when all have so signed, it shall be deemed a signed Agreement.

9. The parties agree to defend the rights and obligations set forth in this agreement and agree not to use each other challenging the legal authority or capacity of DOI or the State to enter into this Agreement or to effectuate any provision in it.

WILLIAM CLARKE,
Secretary of the Interior.

BILL SHEFFIELD,
Governor of Alaska.

○

Calendar No. 598

100TH CONGRESS
2d Session

SENATE

REPORT
100-307

COMPACT OF FREE ASSOCIATION

MARCH 23 (legislative day, MARCH 21), 1988.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S.J. Res. 231]

The Committee on Energy and Natural Resources, to which was referred the joint resolution (S.J. Res. 231) to authorize the entry into force of the "Compact of Free Association" between the United States and the Government of Palau, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the joint resolution as amended do pass.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That entry into force of the Compact of Free Association in accordance with Public Law 99-658 is hereby authorized: Provided, if an action is brought in the Supreme Court of Palau before the date of enactment of this resolution which challenges the procedure under which the Compact was approved pursuant to Republic of Palau Public Law 2-30, the Compact shall take effect in accordance with section 411 of the Compact only if—

(a) the Supreme Court of Palau issues a final ruling which sustains the August 29, 1987, certification by the President of Palau that the Compact was approved pursuant to the Constitution of Palau; or

(b) the action is otherwise disposed of under Palauan law, other than by a final ruling which overturns the August 29, 1987, certification, or

(c) in the absence of the circumstances described in paragraph (a) and (b), the Compact is otherwise approved by the Government of Palau in a manner which satisfies the requirements of the Constitution of Palau and section 411 of the Compact.

SEC. 2. Strike subsection 104(e) of Public Law 99-658, and insert a new subsection 104(e) as follows:

"(e) Neither the Secretary of the Treasury nor any other officer or agent of the United States shall pay or transfer any portion of the sums and amounts payable to the Government of Palau pursuant to this joint resolution to any party other than the Government of Palau, except under the procedures established by the Compact

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and its related agreements. No funds appropriated pursuant to the Compact, this Act, or any other Act for grants or other assistance to Palau may be used to satisfy any obligation or expense incurred by Palau prior to November 14, 1986, with respect to any contract or debt related to any electrical generating plant or related facilities entered into or incurred by Palau which has not been specifically authorized by Congress in advance, except that the government of Palau may use any portion of the annual grant under section 211(b) not required to be devoted to the energy needs of those parts of Palau not served by its central power-generating facility and any portion of the funds under section 212(b) of the Compact for such purpose if subsequent to the effective date of the Compact the President of Palau has formally communicated to the President of the United States and to the President of the Senate and the Speaker of the House of Representatives, that Palau intends to use such funds for such purpose.".

PURPOSE

The purpose of S.J. Res. 231 is to authorize the President of the United States to implement the Compact of Free Association with Palau, one of the four governments comprising the former United Nations Trust Territory of the Pacific Islands.

BACKGROUND

In 1947 the islands of Micronesia held by Japan under a mandate of the League of Nations were placed under the United Nations Trusteeship System with the United States as Administering Authority. The United States has been preparing the Micronesian peoples for self-determination and termination of the Trusteeship and has been negotiating with the various governments of the Trust Territory to resolve their future political status since the late 1960's. Agreements were concluded with the four political entities and on November 3, 1986, the President proclaimed the Trusteeship terminated with respect to three of the four entities comprising the Trust Territory. The Commonwealth of the Northern Mariana Islands became a part of the United States pursuant to Public Law 94-241, and the Federated States of Micronesia and the Republic of the Marshall Islands became Freely Associated States pursuant to Public Law 99-239.

The fourth entity, the Republic of Palau, has been delayed in the implementation of the Compact of Free Association. The Palau courts have ruled that due to certain provisions of the Compact, the Palau Constitution requires a vote of 75 percent approval rather than a simple majority vote. Palau voted three times from 1983 to 1986, in United Nations observed plebescites, in an effort to achieve a 75 percent vote of approval, but failed each time. The votes of approval ranged from 62 to 72 percent.

The U.S. Congress, at the request of both Palau and the Administration, approved the Compact under Public Law 99-658, enacted on November 14, 1986. In response to concerns regarding Palau's difficulties in approving the Compact, Congress included a provision, section 101(d), requiring that the Compact cannot be implemented until the President of the United States certifies to Congress that the Compact has been approved in accordance with Palau's Constitution, and that the United States will be able to carry out its security responsibilities under the Compact. Section 101(d) further provides that Congress must then approve a joint resolution authorizing the President to implement the Compact.

Following U.S. approval of the Compact in November of 1986 there were two more plebiscites held in Palau with the hope of obtaining the necessary 75 percent vote of approval. However, the results were 66 percent and 68 percent respectively.

In a new approach to resolving the conflict between the Compact and the Constitution, the Government of Palau proposed to amend its Constitution so that those articles in conflict with the Compact would not apply during the term of the Compact. If such an amendment were adopted, then the Compact could be approved with a simple majority vote. The Government proposed that the amendment be made according to Article XV of the Palau Constitution which provides for amending the Constitution to avoid "inconsistency with the Compact". The referendum was held on August 4, 1987, and the amendment was adopted, clearing the way for approval of the Compact by a simple majority vote. On August 21, 1987, a sixth plebiscite was held and the Compact was approved by a 73 percent vote of approval. The United Nations visiting mission which observed the plebescite concluded that "the Mission is satisfied that the referendum was conducted fairly and in accordance with the rules, and that the results reflected the freely expressed wishes of the people of Palau".

On July 29, 1987, just prior to the August 4 referendum amending the constitution, a suit was filed (*Merep* v. *Salii*) arguing that Article XIV, not Article XV, of the Constitution governs the process of making amendments. Article XIV, provides that votes on amendments to the constitution may only occur during general elections, and the next opportunity would be November 1988. On August 28, the *Merep* case was settled in a Stipulation for Dismissal. In addition to being signed by the plaintiffs, the Stipulation for Dismissal was also signed by the traditional High Chief of Southern Palau, Ibedul Yutaka Gibbons. The Ibedul, a principal leader of the opposition to the Compact, entered into a Memorandum of Understanding with the President of Palau which was specifically made a part of the Dismissal. The Stipulation specifically affirmed the validity of the constitutional amendment. Following the dismissal, President Salii certified to the U.S. Government, on August 29, that the Compact had been approved by Palau in accordance with its Constitutional processes.

On August 31, the complaint in the *Merep* case was refiled in *Ngirmang* v. *Salii*, but on September 8, this suit was withdrawn.

On November 30, 1987, the President transmitted to Congress the certification anticipated under section 101(d) and a draft resolution which would authorize implementation of the Compact.

The Committee notes that implementation of the Compact, as enacted pursuant to Public Law 99-658, and as approved and requested to be implemented by the Government of Palau, would fulfill the United States' obligations to Palau under the United Nations' Trusteeship Agreement for the United States Trust Territory of the Pacific Islands. The obligation of the United States to the people of the Trust Territory under that Agreement is to "promote the development of the inhabitants of the trust territory toward . . . the freely expressed wishes of the peoples concerned;". The United States has previously met its obligations to the other three entities of the Trust Territory. Thus, meeting its obligations with

respect to Palau fulfills the last of its obligations under the Agreement. Therefore, the Trust Territory of the Pacific Islands will be terminated upon implementation of the Compact with Palau.

Legislative History

S.J. Res. 231 was introduced on December 9, 1987, by Senators Johnston and McClure. A hearing was held before the Full Committee on the measure on January 28, 1988, and on March 23, 1988, it was considered and ordered favorably reported, with amendment, in an open business session.

Committee Recommendation and Tabulation of Votes

The Senate Committee on Energy and Natural Resources in an open business session on March 23, 1988, considered S.J. Res. 231 and by a vote of 17 yeas and 2 nays recommends that the Senate pass S.J. Res. 231, if amended, as described herein.

The rollcall vote on reporting the measure was 17 yeas and 2 nays as follows:

YEAS	NAYS
Johnston	Conrad*
Bumpers	Hecht
Ford*	
Metzenbaum*	
Melcher	
Bradley*	
Bingaman	
Wirth*	
Fowler	
McClure	
Hatfield*	
Weicker*	
Domenici	
Wallop	
Murkowski	
Nickles	
Evans	

*Indicates voted by proxy.

Committee Amendment

The Committee amendment inserts two sections of new text in lieu of S.J. Res. 231, as introduced. The new language of section 1 recognizes the desire of some individuals, as expressed in the Committee's January 28, 1988 hearing, to file a lawsuit challenging the procedure under which the Compact was approved. In addition, the amendment adds a new section 2 to the resolution which would amend Section 104(e) of Public Law 99-658.

Section 1 of the amendment provides that if a lawsuit challenging the procedure under which the Compact was approved is filed before the enactment of this resolution, then the Compact shall take effect only if one of the following three events occurs: one, the Supreme Court of Palau issues a final ruling sustaining the August 29, 1987 certification that the Compact was properly approved pur-

suant to the Constitution of Palau, or, two, the action is otherwise disposed of under Palauan Law, such as a dismissal, withdrawal, or settlement of the action (such as a dismissal based on issue preclusion or the *res judicata* effect of the *Merep* suit) but not a final ruling which overturns the certification; or, three, in the absence of the circumstances described in one and two, the Compact is otherwise approved in Palau in accordance with its constitution and section 411 of the Compact. It is the Committee's intent that the word "final" in subsection (a) means that the ruling of the Supreme Court of Palau would not be appealable.

In the event of the settlement or withdrawal of a lawsuit challenging the approval process in Palau, it is the Committee's expectation that such a settlement or withdrawal would be agreed upon amicably by the parties involved. In the January 28, 1988 hearing before the Committee, it was stated by certain plaintiffs of the *Ngirmang* case that the withdrawal of that lawsuit was brought about by intimidation and threats of violence. The Committee would not regard the settlement or withdrawal of a lawsuit under such circumstances as a settlement or withdrawal for the purposes of subsection (b) of this resolution.

In the event that no lawsuit is filed prior to enactment of this resolution, then the Compact would come into effect as mutually agreed between the Government of the United States and the Government of Palau.

The Committee notes that if a lawsuit were filed after the Compact entered into force, and the Palau Supreme Court determined the Compact had not been approved in accordance with Palau's Constitution, the determination would have no effect on the international obligations created by the Compact. The Committee notes that Article 27 of the Vienna Convention of the Law of Treaties states, "(a) party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Thus, after the Compact comes into effect, Palau could not invoke a contrary ruling by a Palauan court as grounds for refusal to abide by the terms of the Compact.

Section 2 of the amendment would replace the text of section 104(e) of Public Law 99–658 which deals with payment by Palau of a loan for an electric powerplant. The first sentence of the new section 104(e) clarifies that Palau may wish to issue a bond and grant a creditor a security interest in anticipated Compact funds. The procedures for such a transaction must be in accordance with the *Agreement Concerning Procedures for the Implementation of United States Economic Assistance, Programs and Services Provided in the Compact of Free Association between the Government of the United States and the Government of the Republic of Palau.*

The second sentence of the new section 104(e) states that no funds appropriated to Palau, including funds appropriated under the Compact, may be used to satisfy any obligation or expense incurred by Palau prior to November 14, 1986, with respect to any contract or debt related to any electrical generating plant, except that Palau may use any portion of the funds available under section 212(b) and any portion of the funds available under section 211(b) not required to be devoted to the energy needs of those parts of Palau not served by its central power generating facility.

The intent of the original section 104(e) was to ensure that Federal funds made available under the Compact were obligated only for the purposes and in accordance with the intent of Congress in approving the Compact and the appropriation of federal funds. Section 104(e) was not intended to interfere with whatever contractual obligations might exist between Palau and IPSECO, the supplier of a power generating facility. The new second sentence of section 104(e) clarifies that intent. It does not affect the obligation of Palau with respect to this power generating facility, if any, rather it identifies which federal funds may be used to satisfy any obligation. It does not in any way affect or limit the use of local revenues by the Republic of Palau.

The Committee wishes to make absolutely clear that the issue of any liability for the plant is one for Palau and its creditors to resolve. The United States never approved the arrangement and the Appropriations Committees and the Inspector General of the Department of the Interior specifically criticized the arrangement. The amendment notes that certain grant funds for power under section 211(b) of the Compact, and 212(b) for capital accounts, could be used by Palau for this purpose if Palau so chooses, but reiterates the consistent position of the Congress that no Federal funds will be made available for any project in any insular area unless specific authorization is obtained in advance. The Committee expresses no opinion as to whether there is any liability at all by Palau in this matter.

Cost and Budgetary Considerations

In compliance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate, the following estimate of the cost of this measure has been provided by the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

March 23, 1988

Honorable J. Bennett Johnston, Jr.
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has prepared the attached cost estimate for S. J. Res. 231, a joint resolution to authorize the entry into force of the "Compact of Free Association" between the United States and the Government of Palau, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

for James L. Blum
Acting Director

cc: Honorable James A. McClure
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

March 23, 1988

1. BILL NUMBER: S. J. Res. 231

2. BILL TITLE:

A joint resolution to authorize the entry into force of the "Compact of Free Association" between the United States and the Government of Palau, and for other purposes.

3. BILL STATUS:

As ordered reported by the Senate Committee on Energy and Natural Resources on March 23, 1988.

4. BILL PURPOSE:

The resolution would authorize the entry into force of the Compact of Free Association between the United States and Palau. Under current law, the compact, which was approved upon the enactment of Public Law 99-658, is not yet in effect. Public Law 99-658 gives the President the authority to agree to an effective date for the compact once the following conditions are met: the President certifies that compact has been approved, the President concludes agreements with Palau regarding law enforcement and auditing matters, and the Congress enacts a joint resolution authorizing the entry into force of the compact. The President has certified that the first two conditions have been met. Enactment of S. J. Res. 231 would fulfill the third condition and would allow the President to set an effective date for the compact, which the Administration indicates would be during 1988.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(by fiscal year, in millions of dollars)

	1988	1989	1990	1991	1992
Full Faith and Credit - Permanent Spending Authority					
Estimated Budget Authority a/	150	19	23	19	18
Estimated Outlays	150	19	23	19	18
Authorizations Subject to Appropriations Actions					
Estimated Authorization Level	---	8	5	4	4
Estimated Outlays	9 b/	8	5	4	4

Spending Reductions from Termination of Current Trust Territory Authorization c/					
Estimated Authorization Level	—	-17	-17	-17	-17
Estimated Outlays	—	-17	-17	-17	-17
Net Budget Effect of S. J. Res. 231					
Estimated Budget Authority/ Authorization Level	150	10	11	6	5
Estimated Outlays	160	10	11	6	5

Note: Details may not add to totals because of rounding.

a. Public Law 99-349, the Urgent Supplemental Appropriations Bill, 1986, included a permanent appropriation for such sums as necessary to fund amounts that may be authorized upon enactment of the Palau compact.

b. Public Law 99-349 provided an appropriation for Palau of $9.34 million, which will become available for obligation upon the effective date of the Palau compact.

c. These amounts reflect CBO's baseline estimate of payments to Palau through the Trust Territory appropriation and other federal programs. Under current law, programs for Palau are authorized indefinitely and without limitation, and the amounts are set through annual appropriations. Because the compact changes the relationship between the United States and Palau, the existing authorizations for payments to Palau would expire upon the effective date of the Palau Compact (assumed to be in fiscal year 1988), except that the Trust Territory authorization (48 U.S.C. 1681, note) would continue for transition purposes only (Section 102(b) of Public Law 99-658).

The costs of this bill fall within budget function 800.

Basis of Estimate:

The potential budget effects of S. J. Res. 231 would result from making available for obligation funds that have already been authorized and appropriated. Public Law 99-349, the Urgent Supplemental Appropriation Bill, 1986 (enacted July 2, 1986), provided an appropriation of $9.34 million and established a permanent appropriation for such sums as necessary, both to become available for obligation upon enactment of the Palau compact. No outlays for these provisions have been included in CBO's budget estimates under current law, because the funds were not available for obligation, pending further Congressional action. The Congress then approved the Palau compact in Public Law 99-658 (enacted November 14, 1986), but continued to postpone the availability of funds for obligation by requiring further Congressional action before the President could agree to an effective date.

Because enactment of this resolution would remove the final obstacle to a Presidential declaration of an effective date for the compact and to the availability of the compact funds for obligation, S. J. Res. 231 would result in additional outlays of $160 million in 1988 and $5 million to $10 million annually thereafter. Based on information from the Administration, this estimate assumes that the President would declare an effective date for the compact in 1988.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

   Enactment of this legislation would result in no significant cost to the government of Palau, and in no cost to state or local governments.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: James Hearn (226-2860)

10. ESTIMATE APPROVED BY:

for James L. Blum
Assistant Director
for Budget Analysis

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of the Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred on the passage of S.J. Res. 231.

It is the Committee's view that the resolution is not a regulatory measure in the sense of imposing Government established standards of significant responsibilities on private individuals or businesses. It is also the Committee's view that implementation of the Compact would result in a decrease in paperwork for the Federal Government as the measure would increase Palauan self-government and allow for the continued phase-out of the Trust Territory government operating under the authority of the Secretary of the Interior.

Executive Communications

The pertinent documents submitted by the President transmitting S.J. Res. 231 are as follows:

PM-94 11/30/87 Ocean, PNT-Rel. to PM 11-94 Pt. Rec. S+N.R

TO THE CONGRESS OF THE UNITED STATES:

I transmit herewith for the consideration of the Congress a proposed Joint Resolution that, in accordance with Section 101(d)(B) of Public Law 99-658, would enable the Government of the United States and the Government of Palau to implement the "Compact of Free Association" on a date mutually agreed to by our Governments.

In accordance with Section 101(d)(A) of Public Law 99-658, I hereby certify to the Congress that the Compact of Free Association between the United States and Palau has been approved in accordance with Section 411 (a) and (b) thereof, and that there exists no legal impediment to the ability of the United States to carry out fully its responsibilities and to exercise its rights under Title Three of the Compact.

The foregoing certification is based upon notification by the Government of Palau that its internal constitutional approval process has been completed. Specifically, on August 29, 1987, President Lazarus E. Salii certified in writing to the Department of State that 73 percent of the people of Palau voting in a plebiscite observed by the United Nations on August 21, 1987, approved the Compact. The Palau National Congress gave its final approval to the Compact on August 27, 1987. Under their constitution, the people of Palau have freely chosen self-government and free association with the United States.

The proposed Joint Resolution would also amend Section 104(e) of Public Law 99-658 in two ways. First, additional language would be added to the first sentence of this subsection, stating that money payable by the United States to Palau shall be paid to Palau in accordance with procedures provided by the Compact and its related agreements. For example, Palau may wish to issue a bond and grant its creditor a security interest in some of the anticipated Compact funds from the United States, a procedure possible under the Fiscal Procedures Agreement with Palau.

The additional language would clarify that payment into such an encumbered bank account would be consistent with U.S. responsibilities to Palau. This would place Palau on an equal footing with the other freely associated states.

Second, the proposed Joint Resolution would repeal the last sentence of Section 104(e), which purports to strip United States courts of jurisdiction over commercial litigation now pending in the Federal courts between Palau and certain of its creditors. This attempt to grant Palau sovereign immunity for a single case relating to a power plant project is inconsistent with United States law and policy as embodied in the Foreign Sovereign Immunities Act of 1976. Repeal of this provision would protect the reputation of the United States as an international financial center and allow Palau and its creditors to pursue the rights and remedies available to them through the judicial process. Such repeal would also permit the routine application of the Foreign Sovereign Immunities Act. This would not in any way prejudge the matter, but merely enable the case to be heard in the courts of the United States.

Approval of the enclosed Joint Resolution would enable the United States to bring the Compact into effect and end application of the 1947 Trusteeship Agreement with the United Nations Security Council, under which the United States has administered Palau. The end of the trusteeship would mean the beginning of a new era of political, economic, strategic, and cultural partnership between the United States and Palau.

Therefore, I urge the Congress to pass the attached proposed Joint Resolution authorizing entry into force of the "Compact of Free Association."

Ronald Reagan

A JOINT RESOLUTION

To authorize the entry into force of the "Compact of Free Association" between the United States and the Government of Palau, and for other purposes.

Whereas the President of the United States has certified that the Compact of Free Association between the United States and Palau has been approved in accordance with Section 411 (a) and (b) thereof, as required by Section 101(d)(A) of Public Law 99-658; and

Whereas it is the sense of Congress that the President's certification is correct and proper in light of the internationally recognized act of self-determination by which the people of Palau have approved the Compact and in view of the notification by the Government of Palau that its internal approval process has been completed: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That entry into force of the Compact of Free Association in accordance with Section 101(a) and (d) of Public Law 99-658 is hereby authorized.

Section 2. Section 104(e) of Public Law 99-658 is amended to read as follows:

"(e) Neither the Secretary of the Treasury nor any other officer or agent of the United States shall pay or transfer any portion of the sums and amounts payable to the Government of Palau pursuant to this joint resolution to any party other than the Government of Palau, except under the procedures established by the Compact and its related agreements.".

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the joint resolution, S.J. Res. 231, as ordered reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

[PUBLIC LAW 99-658]

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TITLE I—APPROVAL OF COMPACT; INTERPRETATION OF, AND UNITED STATES POLICIES REGARDING, COMPACT; SUPPLEMENTAL PROVISIONS

SUPPLEMENTAL PROVISIONS

SEC. 104. (a) * * *

* * * * * * *

[(e) Neither the Secretary of the Treasury nor any other officer or agent of the United States shall pay or transfer any portion of the sums and amounts payable to the Government of Palau pursuant to this joint resolution to any party other than the Government of Palau. The provisions of section 174(a) of the Compact shall apply with respect to any action based on a contract or debt related to any electrical generating plant or related facilities entered into or incurred by Palau prior to the date of enactment of this joint resolution.]

(e) Neither the Secretary of the Treasury nor any other officer or agent of the United States shall pay or transfer any portion of the sums and amounts payable to the Government of Palau pursuant to this joint resolution to any party other than the Government of Palau, except under the procedures established by the Compact and its related agreements. No funds appropriated pursuant to the Compact, this Act, or any other Act for grants or other assistance to Palau may be used to satisfy any obligation or expense incurred by Palau prior to November 14, 1986, with respect to any contract or debt related to any electrical generating plant or related facilities entered into or incurred by Palau which has not been specifically authorized by Congress in advance, except that the government of Palau may use any portion of the annual grant under section 211(b) not required to be devoted to the energy needs of those parts of Palau not served by its central power-generating facility and any portion of the funds under section 212(b) of the Compact for such purpose if subsequent to the effective date of the Compact the President of Palau has formally communicated to the President of the United States and to the President of the Senate and the Speaker of the House of Representatives, that Palau intends to use such funds for such purpose.

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